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# THE FORGOTTEN AND NEGLECTED: PREGNANT WOMEN AND WOMEN OF CHILDBEARING AGE IN THE CONTEXT OF THE AIDS EPIDEMIC

Carol Beth Barnett\*

The female body has been both territory and machine, virgin wilderness to be exploited and assembly-line turning out life. We need to imagine a world in which every woman is the presiding genius of her own body. In such a world women will truly create new life, bringing forth not only children, (if and as we choose) but the visions, and the thinking, necessary to sustain, console, and alter human existence — a new relationship to the universe. Sexuality, politics, intelligence, power, motherhood, work, community, intimacy will develop new meanings; thinking will be transformed.<sup>1</sup>

## INTRODUCTION

Historically, and to some extent today, mothers have been endowed with respect, and in some cultures, with awe.<sup>2</sup> In many

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1. ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 292 (1976) [hereinafter RICH].

2. CHARLOTTE PERKINS GILMAN, *WOMEN AND ECONOMICS* 268 (Carl N. Degler ed.

ways, becoming an expectant mother creates the ultimate societal approval.<sup>3</sup> Along with this approval, however, comes a paternalistic attitude which may leave a woman with few choices, in poverty, and suddenly less equal than a man simply because she is pregnant.<sup>4</sup> In her provocative account of the "institution" of motherhood, feminist author, philosopher and poet Adrienne Rich writes about the institutions of pregnancy and motherhood which are aimed at ensuring that all women remain under male control.<sup>5</sup> Rich argues that a woman's capacity for bearing children remains one of the keystone mechanisms of male dominance through political, social and legal systems. "In the most fundamental and bewildering of contradictions, [pregnancy] has alienated women from our bodies by incarcerating us in them."<sup>6</sup> While pregnancy may once have been a source of female power, pregnancy remains a root of powerlessness. As more and more pregnant women and women of childbearing age face the epidemic of this century, human immunodeficiency virus (HIV) disease and Acquired Immune Deficiency Syndrome (AIDS),<sup>7</sup> their

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Harper & Row, 1966) [hereinafter GILMAN]; Margaret Mead, *Pregnancy, Childbirth and Outcome: A Review of Patterns of Culture and Further Research Needs*, in *CHILDBEARING: ITS SOCIAL AND PSYCHOLOGICAL ASPECTS* (1967).

3. See Nancy Chodorow, *The Fantasy of the Perfect Mother*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* (Barrie Thorne ed., Longman Inc. 1982); Jane Flax, *Contemporary American Families: Decline or Transformation?*, in *FAMILIES, POLITICS, AND PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE* 21 (Irene Diamond ed., 1983).

4. "Women's mothering is one of the few universal and enduring elements of the sexual division of labor." NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 3 (1978) (focusing on why women in nearly all societies, rather than men, are the primary caretakers and nurturers of children, and why the reproduction of mothering remains a central element in the social organization and reproduction of both the sexual and familial division of labor); see also GILMAN, *supra* note 2, at 17, 294 (offering an economic, Marxist analysis on motherhood and a woman's relationship to society's economic production).

5. RICH, *supra* note 1, *passim*.

6. RICH, *supra* note 1, at xv.

7. The acquired immunodeficiency syndrome (AIDS) is caused by a retrovirus called human immunodeficiency virus (HIV), which was identified in 1983. The term AIDS is sometimes incorrectly used generically to refer to HIV infection. The more appropriate term, HIV infection, covers a wide spectrum of the illness, which can range from a person who is infected but apparently healthy to a person who is critically ill. AIDS is the most severe syndrome from HIV infection. See generally *AIDS: CASES AND MATERIALS* (Michael Closen et al.) 111-76 (1989) [hereinafter *AIDS: CASES AND MATERIALS*]. I will refer to a person with the HIV disease or HIV, throughout the article, a term which encompasses the broad range of severity accorded to the virus. I will, however, continue to use the term AIDS as it used by a particular author quoted within the article, and I will refer to AIDS when referring to the AIDS epidemic.

See also *Benjamin R. v. Orkin Exterminating Co.* 390 S.E.2d 814, 815 n.2 (W.VA

vulnerability to attack by the legal, political and economic systems becomes much greater. This legal, institutional criminalization of pregnant women continues to ghettoize and degrade female potentialities.

Rarely does a week go by that the topic of HIV does not appear in the newspaper, yet the implications of AIDS for women has received scant treatment.<sup>8</sup> Similarly, the health care needs of women with HIV are largely unmet as well.<sup>9</sup> Disadvantaged women and women of color are particularly powerless concerning access to health care, personal autonomy and economic benefits.<sup>10</sup> In fact one author recognized, "the medical, social and legal needs of pregnant women with HIV disease or the HIV infection, disproportionately women of color, are in many ways needs that *preexisted* HIV disease, but which have been magnified by the threat and implications of HIV infection."<sup>11</sup> [emphasis added.] "AIDS has merely raised the already high stakes for

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1990), for a comprehensive discussion of the various stages of the HIV disease; CAL. HEALTH & SAFETY CODE § 199.46(a) (Deering 1990).

8. The Association of the Bar of the City of New York, *AIDS Bibliography*, 42 THE RECORD 260 (1987). "With little exception, HIV research and programs have focused exclusively on homosexual men and intravenous drug users. As a result, there is limited information about the course of HIV infection in women." *Women with HIV Infection 13*, in REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC (June 1988) [hereinafter REPORT OF THE PRESIDENTIAL COMMISSION].

9. Judith Walker, *Mother and Children*, in WOMEN, AIDS, AND ACTIVISM 165 (THE ACT UP/New York, Women and AIDS Book Group, ed., 1990), [hereinafter ACTIVISM]. "The government's indifference toward the actual lives of affected women helps explain the fact that women with AIDS die as much as six times faster after diagnosis than do men." *Id.* See also Arlene Zarembka & Katherine M. Franke, *Women in the AIDS Epidemic: A Portrait of Unmet Needs*, 9 ST. LOUIS U. PUB. L. REV. 519 (1990) [hereinafter Zarembka] (for AIDS advocates to truly represent all persons affected by AIDS, they must recognize that many needs of women with AIDS are far more complex than those currently addressed by AIDS organizations).

10. See generally AIDS, WOMEN AND THE NEXT GENERATION (Ruth R. Faden et al. 1991) [hereinafter NEXT GENERATION] (examining how the HIV epidemic has affected the complex medical, public, health, legal, ethical, and social issues affecting pregnant women and women of childbearing age; particularly for disadvantaged women and women of color).

11. Zarembka, *supra* note 9, at 519; see also Taunya Lovell Banks, *Women and AIDS - Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351, 354 (1990) [hereinafter Banks]. The author takes a critical look at the "history of racist medicine" in this country and finds, rather than creating new problems, that AIDS and attendant governmental indifference have cruelly widened the cracks of discrimination for pregnant women and women of childbearing age. In particular, she notes, "[t]he issue of health policies for fertile women with AIDS or HIV infection is complicated by the fact that most women currently identified as at risk in the United States are poor and/or women of color." *Id.* at 351.

women on the economic margins.”<sup>12</sup> Thus, in the context of AIDS and HIV infection, pregnancy and motherhood merely exacerbate the powerlessness of women.<sup>13</sup>

“Women emerge as a target group primarily because of their ability to transmit HIV perinatally, that is, to fetuses in utero.”<sup>14</sup> Thus, a pregnant woman is an easy target for the legal system and for societal control of her behavior during pregnancy because of the state’s interest [and likewise society’s interest] in protecting the fetus.<sup>15</sup> A common media tactic, for example, is to portray an infant or toddler with HIV disease as an “innocent victim.” The implication in this language and the pervasive attitude is that the mother is in some way “guilty” and therefore deserving of the infection as her “punishment.”

Since HIV can be transmitted by women in utero,<sup>16</sup> special policies and guidelines are being developed to reduce this mode

12. Zarembka, *supra* note 9, at 521.

13. See generally Risa Denenberg, *Pregnant Women and HIV*, in *ACTIVISM*, *supra* note 9, at 165-71.

The government’s indifference toward the actual lives of affected women helps explain the fact that women with AIDS die as much as six times faster after diagnosis than do men. Although more funds must be made available for health care and support services, not all the system’s problems come from lack of money. Some come from a failure to care or plan—especially when those in need are female, poor, and often, people of color.

*Id.* at 165.

14. Banks, *supra* note 11, at 353. “The problem of women with HIV infection is particularly important because it is linked directly to the rapid growth of the pediatric AIDS population.” Report of the Presidential Commission, *supra* note 8, at 13; compare Dr. Mary Guinan, *Deadly Virus Puts Even the Unborn At Risk*, *CHIC. TRIB.*, April 9, 1989 (Contemporary Woman), at 7 (reporting that the CDC estimates that the AIDS virus has infected 100,000 women who will give birth to 20,000 AIDS babies).

15. See Katherine L. Acuff & Ruth R. Faden, *A History of Prenatal and Newborn Screening Programs: Lessons for the Future*, in *NEXT GENERATION*, *supra* note 10, at 59. The authors note the historical precedent for routine use of prenatal screening to protect the fetus; screening which occurred long before the presence of HIV infection. In fact “the routine use of prenatal screening for any condition was first initiated in 1916 at the Johns Hopkins Hospital . . . [which] directed that all pregnant women seen in the clinic be screened for syphilis.” *Id.*

16. Warren Winkelstein Jr., MD, MPH et al., *Sexual Practices and Risk of Infection By the Human Immunodeficiency Virus*, 257 *JAMA* 321-25 (1987). HIV can be transmitted through the placenta and infect the fetus. Studies have shown the HIV virus in amniotic fluid, placental blood, and breast milk. Neonatal infection may also result from swallowing infected blood during delivery and through breast feeding after delivery. *Id.* at 322.

of transmission,<sup>17</sup> rather than providing access to appropriate medical interventions for pregnant women with HIV. These policies include routine HIV testing in prenatal clinics,<sup>18</sup> counseling which would encourage women who tested positive to have abortions,<sup>19</sup> and compulsory sterilization of HIV-positive women of child-bearing age.<sup>20</sup>

The most recent "backlash"<sup>21</sup> against pregnant women can be found in the increased criminalization of certain behavior during pregnancy.<sup>22</sup> This "backlash" now manifests itself in the possibility of women being charged as criminals under certain state statutes for passing the HIV virus to their newborns. This is likely to become a common occurrence as there continues to be greater numbers of transmissions of HIV to infants, particularly children born to a parent or parents who are intravenous drug users. Therefore, in addition to state intervention where mothers are charged with offenses for transferring drugs to their children in utero, some states are now intervening and prosecuting women (never the father) for the criminal offense of trans-

17. See *infra* notes 110-114 and accompanying text.

18. Several states have anonymously tested blood samples of newborns for HIV antibodies with the goal of determining perinatal (mother-to-baby) transmission of HIV antibodies (not the virus itself) during pregnancy. Florida and Michigan require HIV testing of pregnant women. Rhode Island allows testing of newborns without maternal consent. Similar laws are now being considered or enacted in other states. See Banks, *supra* note 11, at 355-361.

For a comprehensive analysis of the complex medical, public, health, legal, ethical, and social issues raised by HIV screening and testing of pregnant women and newborns, see generally, NEXT GENERATION, *supra* note 10. The book is particularly noteworthy because of its particular attention to the debate about perinatal HIV screening and testing and its focus as much on the needs of pregnant women as on newborns.

19. See Michael Closen & Scott Isaacman, *Criminally Pregnant: Are AIDS-Transmission Laws Encouraging Abortion?*, 76 A.B.A. J. 77 (December 1990) [hereinafter Closen].

20. See Susan Clarke, *Subtle Forms of Sterilization Abuse: A Reproductive Rights Analysis*, in TEST TUBE WOMEN (Rita Arditti et. al. eds., 1989).

21. I am using Susan Faludi's meaning of the word "backlash" as used against women as mothers, to the extent, the media and society in general, views pregnant women and mothers are pitted against their bodies and fetuses. Women are thus seen as antagonists with their own children, and blamed for giving birth to babies that are drug-addicted or have the AIDS virus. "The backlash line," writes Faludi, "claims the women's movement cares nothing for children's rights — while its own representatives in the capital and state legislatures have blocked one bill after another to improve child care, slashed billions of dollars in federal aid for children, and relaxed state licensing standards for day care centers." SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN xxii-xxiii (1991) [hereinafter FALUDI].

22. See *infra* notes 53, 66, 68-72 and accompanying text.

mitting HIV to their child.<sup>23</sup> One author explains that these laws have the practical affect of "encourag[ing] abortion"<sup>24</sup> to avoid committing crimes.

This article will explore why pregnant women with HIV disease have become the focus of some of the most deeply-rooted value judgments about women and HIV, and how certain governmental policies, including state statutes, and local medical practices by hospitals, doctors and health clinics, raise reproductive freedom issues for pregnant women and women of childbearing age in the context of AIDS and HIV infection. Part I discusses the overall demographic picture of women with HIV disease, particularly as it relates to the interconnection between substance abuse and the transmission of HIV disease to women, and its affect on the numbers of children born infected with HIV. Part II addresses the current "attack" by the media and the criminal justice system on pregnant women who use illegal drugs; with this backdrop, the analysis compares certain criminal statutes which affect pregnant women, and argues that the focus on the "tragedy" of fetuses being exposed to drugs has led to a fear of possible fetal exposure to the HIV disease virus, which, in turn, has led many states to adopt statutes which would criminalize certain HIV transmission related practices during pregnancy. Part III focuses on the reproductive rights issues affecting pregnant women with HIV disease, specifically, policies ranging from: HIV screening and counseling; general refusal to treat HIV patients; and denial of access to abortions; to suggestions of sterilization to reduce the number of children with HIV disease. Given society's attitudes<sup>25</sup> and the government's policies of punishment for people with HIV disease gen-

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23. See *infra* notes 110-114 and accompanying text.

24. Closen, *supra* note 19.

25. See generally RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE AND THE AIDS EPIDEMIC (1987) [hereinafter SHILTS]. The author tells the story of how AIDS and the deaths of many were silenced by the government, the media, and consequently society as a whole, as the disease first developed in the early eighties:

People died and nobody paid attention because the mass media did not like covering stories about homosexuals and was especially skittish about stories that involved gay sexuality. Newspapers and television largely avoided discussion of the disease until the death toll was too high to ignore and the casualties were no longer just outcasts. Without the media to fulfill its role as public guardian, everyone else was left to deal—and not deal—with AIDS as they saw fit. *Id.* at xxii-iii.

erally<sup>26</sup>, combined with the increased powerlessness and dire health needs of HIV positive women, one must ask, what is to become of the institution of motherhood for women with HIV disease? Are we on the path, as one author posed, of "out-law[ing] motherhood for HIV-infected women"?<sup>27</sup>

## I. DEMOGRAPHICS: WOMEN WITH HIV

The number of women affected by the HIV disease has increased steadily over the last three years.<sup>28</sup> As of March, 1992, 22,607 women aged thirteen and older in the United States have been diagnosed with the HIV disease.<sup>29</sup> This accounts for eleven percent of the total number of HIV cases.<sup>30</sup> Moreover, "HIV is increasingly an epidemic of poor people and people of color."<sup>31</sup> Women living with the HIV infection and AIDS are disproportionately women of color.<sup>32</sup> The harsh reality is that the HIV disease is the fastest growing killer among women of childbearing age, particularly young women of color.<sup>33</sup>

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26. See generally SHILTS, *supra* note 25; AIDS: CASES AND MATERIALS, *supra* note 7.

27. *Id.*

28. The number of HIV cases among American women reported to the Center for Disease Control (CDC) was 10,611 as of December 1989, representing nine percent of the 117,781 cases. CENTER FOR DISEASE CONTROL, HIV/AIDS SURVEILLANCE REPORT 11 (Sept. 1989) [hereinafter CENTER FOR DISEASE CONTROL, Sept. 1989]. This number represents a steady increase in the percentage of women diagnosed with HIV over the years of data collection (3 percent in 1981, 6.8 percent in 1983, and 9 percent in 1989). Risa Denenberg, *What the Numbers Mean*, in ACTIVISM, *supra* note 9, at 2.

29. CENTER FOR DISEASE CONTROL, HIV/AIDS SURVEILLANCE REPORT, QUARTERLY REPORT 10 (April 1992) (QUARTERLY REPORT).

30. *Id.*

31. See generally Zarembka, *supra* note 9, at 521-23, for a discussion of the demographics of HIV disease in women. As of March 31, 1992, twenty-nine percent of all persons with AIDS in the U.S. were Black and sixteen percent were Hispanic/Latino-Americans.

32. *Id.* Though Black and Hispanic women make up nineteen percent of all women in the United States, they represent seventy-three percent of women with AIDS. Marion Banzhaf, *Race, Women, and AIDS: Introduction*, in ACTIVISM, *supra* note 9, at 81. The author notes that the disproportionate number of women with AIDS cannot be viewed in a vacuum; the numbers instead reflect racism that permeates all aspects of society. In fact, "AIDS is only the most recent health crisis to attack people of color. A common adage of the Black community is: when White people get a cold, Black people get pneumonia." *Id.* at 81.

33. Dazon Dixon, *Facing Reality: AIDS Education and Women of Color*, in ACTIVISM, *supra* note 9, at 228. See CENTER FOR DISEASE CONTROL, cited in *AIDS Top Killer of Young Black Women in 2 States*, CHIC. TRIB. July 11, 1990, (News Section) at 2. The author points out that today AIDS is the fifth leading cause of death among Black women. In New York, among Black women ages fifteen to forty-four, AIDS was the leading cause of death, exceeding the rates of heart disease and cancer, as well as accidents.



The full impact that the HIV disease epidemic has on women is most clearly understood by the significant interconnection between substance abuse and the transmission of HIV disease.<sup>34</sup> Today, intravenous (IV) drug users are the second largest risk group for HIV infection in America.<sup>35</sup> HIV among IV-drug users has become the single most important source for the spread of the infection to non-risk groups, including women.<sup>36</sup> Indeed, over fifty percent of infected women are exposed to the HIV virus by IV drug use,<sup>37</sup> and seventy-nine percent of all children born infected with HIV have mothers who are either IV drug users or have had sexual relations with an IV drug user.<sup>38</sup> "This demographic shift of the AIDS virus from gay men to IV drug users is pivotal in the AIDS epidemic because it represents the principle bridge to other adult populations through heterosexual transmission and to children through pre-natal transmission."<sup>39</sup>

The impact of HIV disease on women's lives has been devastating.<sup>40</sup> HIV infection tends to worsen existing forms of ine-

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*Id.* According to a 1988 study, "the death rate for HIV/AIDS in Black women fifteen to forty-four years of age was nine times the rate in white women of the same age." See Michael Chu et al., *Impact of the Human Immunodeficiency Virus Epidemic on Mortality in Women of Reproductive Age, United States*, 264 JAMA 227 (1990). The study concludes that the majority of Black women with AIDS and HIV infection are the result of IV drug use or sex with IV drug users. *Id.* at 229.

34. See Larry Gostin, *The Interconnected Epidemics of Drug Dependency and AIDS*, 26 HARV. C.R.-C.L. L. REV. 113, 116 (1991) [hereinafter Gostin]. "While drug dependence and HIV are America's two most pressing epidemics, they are interconnected by a cycle of urban poverty, physical dependence, and a culture of sharing needles and syringes." *Id.* at 116.

35. In New York City alone, almost ninety percent of the heterosexual transmission cases of AIDS involve sexual relations with an IV drug user. Don des Jarlais, *The Psychology of Preventing AIDS Among Intravenous Drug Users*, 43 AM. PSYCHOL. 865 (1988).

36. Gerald H. Friedland & Robert S. Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 1125, 1127 (1987) (ninety percent of IV drug users are heterosexual, and thirty percent are women, ninety percent of whom are in their childbearing years).

37. Gostin, *supra* note 34, at 116. Intravenous drug users are now the second largest risk group for HIV infection in the American population.

38. CENTER FOR DISEASE CONTROL, Sept. 1989, *supra* note 28, at 9.

39. Gostin, *supra* note 34, at 116.

40. Kim Christensen, *How Do Women Live?*, in ACTIVISM, *supra* note 9, at 5.

Differing access to medical information, early interventions, and treatment . . . make HIV infection a radically different experience for a wealthy, white, childless man than for a low-income Latina mother. . . . In order to understand the impact

quality and oppression based on gender, race, ethnicity, and class.<sup>41</sup> Most women already enter the HIV crisis with fewer resources and support systems.<sup>42</sup> The underreporting of women with HIV has very real consequences for the health care needs of women.<sup>43</sup> Moreover, HIV research and the bulk of medical attention paid to women have come in the context only as it pertains to their role as child bearers.<sup>44</sup> In particular, one author noted how the medical establishment's view of men as "the norm" further complicates HIV prevention, detection, and treatment for women. She writes:

On the one hand, women are often invisible to medical researchers, and the HIV research establishment is no exception. For example, many experimental HIV drug trials completely exclude women. On the other hand, women are often treated as potential 'fetus incubators' whose reproductive capacities are valued more than our lives . . . .<sup>45</sup>

Consequently, many women with HIV remain invisible, and are diagnosed with HIV only after they have died.<sup>46</sup>

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of the AIDS crisis on women, we need a realistic picture of where women are economically, politically, and medically . . . . Any group's access to resources, public attention, and power is critical in determining how well they will fare in the AIDS epidemic.

*Id.*

41. See generally *id.* at 5-15.

42. *Id.*

43. Zarembka, *supra* note 9, at 523. For a full explanation why there is underreporting of HIV in women, see Zarembka *supra* note 9, at 522. According to another author, numbers alone are deceiving in assessing the magnitude of the threat of HIV to women. The statistics may "unfairly stigmatize African-American and Latina women because they may not reflect the true extent of HIV infection among all women." Banks, *supra* note 11, at 352. This is true because the primary sources of the statistics are state departments of public health which get information from public hospitals and public health clinics rather than from private health care providers. *Id.* And because the numbers of HIV infected women are underreported, less money is put into women's health care needs; support services are lacking, and women fail to get adequate treatment. They do not qualify for health benefits, child care, rent subsidies, or other support services available to PWAs (People With AIDS), and they are not provided with information on how to care for themselves. See generally Kim Christensen, *How Do Women Live?*, in *ACTIVISM*, *supra* note 9, at 5.

44. *Id.* "As the public health impact of HIV infection in women and children has increased, so has interest in screening pregnant women and newborns for evidence of HIV infection." *NEXT GENERATION*, *supra* note 10, at v.

45. Kim Christensen, *How Do Women Live?*, in *ACTIVISM*, *supra* note 9, at 5.

46. *Id.* See, e.g., Bakerman, *The Incidence of AIDS Among Blacks and Hispanics*,

Given the close connection between HIV and IV drug use,<sup>47</sup> it should be no surprise that the methods to curb the epidemics are also connected. Instead of policies directed at controlling substance abuse and a strategy focused on reducing the demand for illicit drugs and reducing the spread of HIV in the drug-dependent population, the current approach to curb the epidemics remains blaming the victim and implementing criminal statutes to "punish" the behavior. Unfortunately for pregnant women, the current public outrage directed at women who use illegal drugs during their pregnancies,<sup>48</sup> and the resulting media attention,<sup>49</sup> have focused primarily on the criminalization of pregnant drug addicts.<sup>50</sup> These criminalization policies are now being extended to women transmitting HIV status to their children.<sup>51</sup>

## II. SOCIETY'S RESPONSE TO PREGNANT WOMEN AND WOMEN OF CHILDBEARING AGE

### A. DRUG DEPENDENCY AND THE CRIMINALIZATION OF PREGNANT WOMEN

Throughout the country, pregnant women who use illegal drugs and alcohol are targeted by the media<sup>52</sup> and the criminal

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79 J. NAT'L MED. ASS'N. 921, 922 (1988) [hereinafter Bakerman]; E.O. Laumann et al., *Monitoring the AIDS Epidemic in the United States: A Network Approach*, 244 SCIENCE 1186, 1188 (1989) (suggesting that CDC undercounted the prevalence of AIDS among whites in higher socioeconomic classes and overestimated the prevalence in minority populations).

47. Gostin, *supra* note 34, at 116.

48. See *infra* notes 52-65 and accompanying text.

49. See generally FALUDI, *supra* note 21, at 421-30.

50. See *infra* notes 66-72 and accompanying text.

51. See *infra* notes 110-114 and accompanying text.

52. The image of the pregnant drug user as a betrayer, as one whose interests are diametrically opposed to those of her fetus, as one who will intentionally harm her fetus unless stopped by the state, surely is a seductive one. It requires only that we purge society of these bad women, rather than forcing us to address the more troubling issue of why drug abuse is so prevalent in this country. However, it is also [and remains] a pernicious image.

Michelle Oberman, *Sex Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 548 (1992) [hereinafter Oberman]. The author addresses some of the contextual factors that shape the lives of women who use drugs, especially pregnant addicts, and focuses on the psychological, sociological, physiological, and economic factors which contribute to the prevalence of substance abuse by pregnant women. See generally FALUDI, *supra* note 21.

justice system.<sup>53</sup> "The government has attempted to use the force of law to compel women to behave in ways deemed likely to promote the birth of healthier babies."<sup>54</sup> Yet, "the prosecution of these women is the result of a peculiar conflation of the anti-abortion and anti-drug 'movements'."<sup>55</sup> The so-called "pro-life" movement, for example, has had a great impact on the way society views pregnancy.<sup>56</sup> "They have promoted (a model of) pregnancy that by its very nature pits women and fetuses against each other, with the fetus invariably taking precedence, and a model of women as selfish, confused, potentially violent and incapable of making responsible choices."<sup>57</sup> "Today's drug problem has provided a new context in which state intervention into the lives of pregnant women becomes more acceptable because of the danger that drug use poses to the fetus."<sup>58</sup> The anti-choice movement's success has created newly perceived state interests extending to the fetus, and the legal right to be born with a sound mind and body,<sup>59</sup> which accounts for greater recognition of fetal rights.<sup>60</sup> Yet, any equating of fetal rights with children's

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53. Over the past two years, officials have brought more than fifty criminal prosecutions against pregnant women under state statutes criminalizing harmful acts committed against children. See Paul Logli, *The Prosecutor's Role in Solving the Problems of Prenatal Drug Use and Substance Abused Children*, 43 HASTINGS L.J. 559 (1992) [hereinafter Logli]. Prosecutors cannot avoid involvement in this issue because of both the political pressure to respond and their legal duty to prevent child abuse. *Id.* at 562.

54. Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569 (1991) [hereinafter Johnsen].

55. John Powell, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 597 (1991) [hereinafter Powell].

56. See FALUDI, *supra* note 21, at 132-35, for a discussion of how the television and film industries, in particular have responded to the views of women as mothers.

57. Katha Pollitt, *A New Assault on Feminism*, THE NATION, March, 1990, at 409, 414 [hereinafter Pollitt].

58. Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 278 (1990).

59. Department of Soc. Servs. v. Felicia B., 543 N.Y.S. 2d 637, 638 (1989) (court recognized "the legal right of every human being to begin life unimpaired by physical, mental or emotional defects resulting from the neglectful acts of the parent" and denied the motion to dismiss the complaint against the mother).

60. To a remarkable degree the anti-abortion movement succeeded by the end of the 80's in bringing much of the medical and legal establishment around to its vision of the fetus and mother. The fetus would become the primary patient in the prenatal operating room, the full citizen in the lawbooks, and lead plaintiff in the courtroom. In fact by the close of the 80's, a fetus actually had more legal rights in some areas than a live child.

FALUDI, *supra* note 21, at 421.

rights will eviscerate women's reproductive choice.<sup>61</sup>

This assault on pregnant women allows society to avoid the difficult and uncomfortable questions regarding substance abuse and the AIDS epidemic.<sup>62</sup> It is no surprise, therefore, that fetal rights advocates frame the issue as a conflict between the right of the fetus to be born free of such damaging substances and the mother's right to pursue a *lifestyle* that includes the use of tobacco, alcohol, narcotics, and drug abuse. (emphasis added).<sup>63</sup> This perspective views the woman and the fetus as distinct legal entities having adverse interests, and assumes that the government's role is to protect the fetus from the woman.<sup>64</sup> Consequently, "[t]he government has attempted to use the force of law to compel women to behave in ways likely to promote the birth of healthier babies."<sup>65</sup>

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61. *Roe v. Wade*, 410 U.S. 113 (1973) (establishing women's fundamental right to abortion in the first trimester). "Perhaps because the right of privacy incorporates so much, it ultimately guarantees little." Christyne L. Neff, *Woman, Womb and Bodily Integrity*, 3 YALE L.J. & FEMINISM 327 (1991) [hereinafter Neff]. The author explores how privacy law has failed to protect a woman's right to decide whether to terminate her pregnancy. In particular, the privacy doctrine has provided little guidance for women's right to choose, because the right is always balanced against the states right to interfere with her decision in furtherance of its own policies. Namely, "[i]t is now the fetus that dominates the debate." *Id.* But see *Casey v. Planned Parenthood of S.E. PA*, 112 S. Ct. 2791, 2800-76 (1992) (holding that while the doctrine of *stare decisis* requires affirmance of *Roe v. Wade*'s essential holding recognizing a woman's right to choose an abortion before fetal viability, the "undue burden test," rather than the trimester framework should be used in evaluating abortion restrictions before viability).

62. The impact of criminal sanctions on pregnant women is disproportionately on poor women and women of color. See generally Powell, *supra* note 55. The author traces today's "war on drugs," and how governmental policies have been particularly punitive to casual users, women and children, and most aggressively to those who are poor and people of color. The American Civil Liberties Union recently examined fifty-seven criminal prosecutions brought against pregnant women in the past two years. The survey revealed that approximately eighty percent of the forty-seven cases in which the defendant's race could be determined were brought against women of color. Lynn Paltrow et al., *State by State Summary of Criminal Prosecutions Against Women*, (memorandum prepared for ACLU March 29, 1991, copy on file with the *U.C. Davis Law Review*). A study conducted in Pinellas County, Florida found that "a black woman who uses drugs or alcohol during pregnancy is almost ten times more likely to be reported to state authorities than a white woman." Ira Chasnoff, *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandating Reporting in Pinellas County Florida*, 322 NEW ENG. J. MED. 1201, 1203-04 (1990).

63. Pollitt, *supra* note 57, at 414-18.

64. *Id.* at 571.

65. Johnsen, *supra* note 54, at 570.

There can be no serious dispute that once a woman has chosen to bear a child, the government has a legitimate interest in pushing policies that will improve the likelihood her baby will

Application of narcotics laws to pregnant women, charging and prosecuting mothers for child abuse or for "delivery" of controlled substance to minors through the placenta,<sup>66</sup> while seemingly far-fetched ten years ago, is happening today.<sup>67</sup> Prosecutors in several states have attempted to prove that criminal delivery of controlled substances has occurred via the umbilical cord after birth but before the cord is severed.<sup>68</sup> In addition, women have been jailed or placed under house arrest for the duration of their pregnancy,<sup>69</sup> and mothers have been arrested in their hospital beds when their newborns tested positive for drugs.<sup>70</sup> Other jurisdictions have approved custodial commitment petitions,<sup>71</sup> and even termination of parental rights based on prenatal drug use by the mother.<sup>72</sup>

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be healthy . . . . What is at issue are the specific means employed to improve the health of children and pregnant women: how should the government pursue this important goal?

*Id.* The courts, legislatures, and state prosecutors increased imposition of special restrictions on women who decide to bear children, allows for no analysis of, or sensitivity to, the complex reasons why increasing numbers of young women have been driven to crack cocaine and other drugs, or how a woman makes various decisions in her life which will combine to affect fetal development in a current or future pregnancy. *Id.* at 574. These issues are beyond the scope of this article, but see generally, Johnsen, *supra* note 54, for a comprehensive discussion of how coercive and punitive governmental policies that create conflict between women's liberty and the promotion of healthy births are unnecessary. Instead, the author posits, a "facilitative model" of governmental action which acknowledges the complicated choices women must make when they are pregnant, and how this model instead, assumes that each woman—and not the government—is best situated ultimately to decide how to balance these competing risks and moral considerations. *Id.* at 574.

66. See Lynn Paltrow, *When Becoming Pregnant is a Crime*, 9 CRIM. JUST. ETHICS 41 (1990).

67. Oberman, *supra* note 52, at 519; Logli, *supra* note 53. See generally Kary Moss, *Legal Issues: Drug Testing of Postpartum Women as the Basis for Civil and Criminal Proceedings*, 23 CLEARINGHOUSE REV. 1406 (1990).

68. *Johnson v. State*, 602 So. 2d 1288 (Sup. Ct. Fla. 1992) (conviction reversed by Florida Supreme Court: ingestion of a controlled substance by a mother, who knows that it will pass to her child, is not a violation of Florida law). See *supra* notes 71-75 and accompanying text.

69. Zarembka, *supra* note 8, at 526.

70. See, e.g., *In re Stephen W.*, 271 Cal. Rptr. 319 (1990) (newborn infant tested positive for drugs and placed in foster care; court reasoned that narcotic addicts are not able to care for child and thus render child susceptible to harm); *In re Troy D.*, 263 Cal. Rptr. 869 (1989) (newborn infant tested positive for drugs and placed in foster care; court held that prenatal use of drugs is probative of future neglect).

71. *In re Troy D.*, 263 Cal. Rptr. 869 (1989), (commitment petition).

72. *In re Solomon L.*, 236 Cal. Rptr. 2 (1987) (both commitment and termination petitions); *In re Nash*, 419 N.W.2d 1 (Mich. 1987) (commitment petition); *In the Matter of Baby X*, 293 N.W.2d 736 (Mich. 1980) (commitment petition); *Matter of Stefanel Ty- esha C.*, 556 N.Y.S.2d 280 (1990) (commitment petition).

In 1992, however, courts in two states, Florida and Connecticut, ruled that a pregnant woman could not be held legally accountable for exposing her newborn child to drugs.<sup>73</sup> In Florida, prosecutors had charged Jennifer Johnson with two counts of delivering drugs to her children at birth after her son, born in 1987, and her daughter, born in 1989, both tested positive for cocaine.<sup>74</sup> Johnson was convicted and sentenced to fifteen years probation.<sup>75</sup> While the state appeals court affirmed, the Supreme Court of Florida, in a unanimous ruling, found that the Legislature never intended the drug trafficking law to be used against a woman for giving birth to a drug-exposed infant.<sup>76</sup> In a thoughtful, well-reasoned opinion, Justice Major B. Harding wrote: "The court declines the state's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread."<sup>77</sup> In particular, the court held that the legislative history of the applicable statute was not intended to use the word "delivery" in the context of criminally prosecuting mothers for delivery of controlled substance to a minor by way of the umbilical cord.<sup>78</sup> Perhaps most notable about the opinion is its clear assertion that "prosecuting women for using drugs and 'delivering'

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73. *Johnson v. State*, 602 So. 2d 1288 (Sup. Ct. Fla. 1992); *In re Valerie D.*, 613 A.2d 748 (Sup. Ct. Conn. 1992). In both cases, the trial court held and the Court of Appeals affirmed, that a petition for neglect or termination of parental rights could be based solely on a mother's prenatal conduct.

74. *Johnson*, 602 So. 2d at 1292.

75. Mark Hansen, *Courts Side With Moms in Drug Cases*, 42 A.B.A. J. 18 (November 1992) [hereinafter Hansen].

76. *Johnson*, 602 So. 2d at 1291. Rather than focusing on the [moral implications of the] woman's behavior, the court, instead, focused on the legislative history of the statute, and Justice Harding, observed: "My review of other pertinent legislative enactments . . . leads me to conclude in this case that the Legislature expressly chose to treat the problem of drug dependent mothers and newborn as a public health problem and that it considered but rejected imposing criminal sanctions . . ." *Id.* at 1293. Dictum in the case also expressly addresses the concern of the Legislature not to authorize criminal prosecution of mothers who give birth to drug dependent children. "Criminal prosecutions of mothers like Johnson will undermine Florida's express policy of 'keeping families intact' and could destroy the family by incarcerating the child's mother when alternative measures could protect the child and stabilize the family." *Id.* at 1294, quoting Brian C. Spitzer, *A Response to "Cocaine Babies"*, 15 FLA. ST. U. L. REV. 865, 881 (1987).

77. *Johnson*, 602 So. 2d at 1297. Instead, the court narrowly focused the issue on whether the legislature intended the language to contemplate termination of parental rights based on prenatal conduct that results in harm to the child upon its birth. Applying well-settled principles of statutory construction, including the language of the statute, and the legislative intent of the statute, the court found that the statute did not permit termination of parental rights based upon prenatal conduct of the mother. *Id.*

78. *Id.* at 1291. The argument applying the "delivery" statute was also rejected in Michigan. See *People v. Hardy*, 469 N.W.2d (Mich. 1991).

them to their newborn appears to be the least effective response to this [drug] crisis."<sup>79</sup> The court also recognized the importance of advocating that pregnant women substance abusers be provided with rehabilitative treatment, rather than criminal sanctions.<sup>80</sup>

Similarly, the Connecticut Supreme Court held that the actions of a twenty-three year old woman who injected cocaine as she was about to go into labor could not be used to justify taking her newborn daughter away from her.<sup>81</sup> In a unanimous five-judge panel, Justice David M. Boren spoke for the court and noted:

[W]e do not endorse the moral quality of the conduct of the . . . [mother] in this case . . . . Nor . . . are we here to condemn her . . . . Our task, rather, is to determine whether the legislature . . . intended [the law] to apply in a case such as this. We do not believe that it did.<sup>82</sup>

As in *Johnson v. State*,<sup>83</sup> the court in *In re Valerie D.*<sup>84</sup> not only avoided the constitutional arguments, but focused almost exclusively on the narrow statutory question and legislative construction, and ruled that existing state law did not permit the termination of a woman's parental rights based solely on her conduct during pregnancy.<sup>85</sup>

Although appellate courts around the country have rejected prosecutions of pregnant women,<sup>86</sup> the criminal charges against

79. *Johnson v. State*, 602 So. 2d 1288, 1295 (Sup. Ct. Fla. 1992). In the opinion, Justice Harding addresses the social, political, medical and legal implications of allowing criminal penalties for pregnant women who use illegal substances.

80. *Id.* at 1296 (Sup. Ct. Fla. 1992) (citing *Legal Interventions During Pregnancy*, in the AMERICAN MEDICAL ASSOCIATION BOARD OF TRUSTEES REPORT, 264 JAMA 2667, 2670 (November 28, 1990)).

81. *In re Valerie D.*, 613 A.2d 748 (Sup. Ct. Conn. 1992).

82. *Id.* at 759.

83. 602 So. 2d 1288 (Sup. Ct. Fla. 1992).

84. *In re Valerie D.*, 613 A.2d 748 (Sup. Ct. Conn. 1992).

85. *Id.* The court noted, that while the mother's drug use had certainly been egregious, the state's child abuse statute was never meant to encompass prenatal conduct. *Id.* at 765.

86. Hansen, *supra* note 75. At least 167 women in twenty-four states have been prosecuted for exposing a newborn child to drugs, according to the Center for Reproductive Law & Policy, quoted in Hansen, *supra* note 75. "In most states," notes litigation director Lynn Paltrow, "the women involved either pleaded guilty or accepted plea bargains. But in the twenty-one cases that have been challenged or appealed, . . . all have



pregnant women continue.<sup>87</sup> Some prosecutors continue to use general allegations of abuse and neglect to prove that a child showing signs of withdrawal or addiction deserves protection by the family court from future abuse.<sup>88</sup> The prosecutor in *Johnson v. State*,<sup>89</sup> said "a pregnant drug user still could be prosecuted for child abuse if her behavior is shown to hurt her baby."<sup>90</sup>

Other prosecutors, however, view the need to appeal to the state legislature to re-draft the current statutes to permit criminalizing of pregnant women or termination of parental rights based on prenatal conduct of the mother.<sup>91</sup> The prosecutor in *In re Valerie D.*<sup>92</sup> said he may ask the Legislature to amend the state child abuse law to include a mother's harmful prenatal conduct as a ground for removing her child.<sup>93</sup>

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been dismissed or overturned." *Id.*

87. On October 16, 1992, California Attorney General Dan Lungren filed an appeal to pursue murder charges against a San Benito County woman who ingested cocaine in her ninth month of pregnancy before delivering a stillborn child. Rorie Sherman, *Pregnant Drug Abusers Sue for Treatment*, NAT'L L. J., November 2, 1992, at 9 [hereinafter Sherman]. The case, *People v. Juargue*, No. H010384 (Cal. App. Ct., 6th Dist.), will be the first to test whether a mother can be prosecuted under a California law originally designed to permit murder charges against third parties who kill a fetus. *Id.* "These cases," notes Lynn Paltrow, litigation director of the Center for Reproductive Law and Policy, "have all been brought by renegade prosecutors who have taken existing statutes intended for some other purpose and used [those statutes] against drug-addicted women who became pregnant and chose to carry their baby to term." Hansen, *supra* note 75.

88. See, e.g., *In re Baby X*, 293 N.W.2d 736 (Mich. 1980). In *In re Baby X*, the mother argued that her prenatal ingestion of narcotics did not constitute neglect sufficient for the Probate Court's assertions of jurisdiction. The Michigan court responded by holding that prenatal behavior can be probative of a child's neglect. It held that a newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may constitute child neglect. *Id.* at 739.

89. 602 So. 2d 1288.

90. Hansen, *supra* note 75. "Eight states now have laws requiring that evidence of drug exposure in newborns be reported as child abuse or neglect, which could lead to the child's removal and the termination of a mother's parental rights," according to Alison Marshal, legal counsel for the National Association of Perinatal Addiction Research and Education, in Hansen, *supra* note 75.

91. Some have argued that courts, generally, are reluctant to be perceived as the "pregnancy police." Joseph Calve, THE CONN. LAW TRIB., August 24, 1992 at A-1. Therefore, prosecutors faced with judicial reluctance to step onto the slippery slope of when to punish prenatal abuse, might then have to depend on a legislative determination rather than a judicial question. *Id.*

92. 613 A.2d 748 (Sup. Ct. Conn. 1992).

93. Hansen, *supra* note 75. See generally Judith Larsen et al. eds., *Medical Evidence in Cases of Intrauterine Drug and Alcohol Exposure*, 18 PEPP. L. REV. 279, 280 (1991) (discussing the evidence required to prove infant drug and alcohol exposure under the current civil statutes which have "refurbish[ed]" old law with new drug or alcohol-specific definitions of neglect and abuse). In 1989, Illinois amended their child abuse

Nevertheless, many believe that these two state supreme court decisions demonstrate significant legal victories,<sup>94</sup> and reflect a "nationwide trend away from punitive treatment of drug-addicted pregnant women."<sup>95</sup> Many prosecutors believe such punitive measures merely scare pregnant women from seeking needed medical attention.<sup>96</sup> "The political reality seems to indicate that statutes specifically prohibiting drug use by pregnant women will have a greater chance of passage if they are primarily intended to foster rehabilitative care rather than impose punishment."<sup>97</sup> According to one author, most prosecutors believe that women who have engaged in prenatal substance abuse "should be placed in available treatment beds, not prison beds."<sup>98</sup>

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statute to include those children born with controlled substances in their blood or urine. See ILL. REV. STAT. ch. 37, para. 802-3(c) (1989).

94. Hansen, *supra* note 75. Indeed both cases agreed that such continued punitive measures merely scare pregnant women who use drugs away from getting needed medical attention. *In re Valerie D.*, 613 A.2d 748 (Sup. Ct. Conn. 1992). Relying upon the legislative history of the statute in both the states House and Senate, the court noted that provisions in both bills entailed the significant risks that pregnant women who had used illegal drugs during pregnancies would avoid prenatal care and substance abuse treatment. *Id.* at 762-64 nn.21 & 23.

95. Sherman, *supra* note 87. The question remains whether the high courts in other states will apply a strict statutory application of the states child abuse laws to reject prosecutions of substance-abusing pregnant women. While the long term impact of these cases is still unknown, the dicta of the cases, perhaps, reflects a changing attitude of using criminal sanctions as "punishment" for women and dealing with substance abuse infants.

96. See generally Logli, *supra* note 53, where the author discusses the prosecutor's role in solving the problem of prenatal substance abuse. He notes at the outset that prosecutors cannot avoid involvement in this issue because of both political pressure to respond and their legal duty to prevent child abuse. And while he advocates the need for new legislation to increase prosecutor's ability to protect children at risk from parental substance abuse, he recognizes that, "coercive state action can play a productive role in addressing the problem only if pursued in conjunction with more supporting government policies." *Id.* at 565.

97. *Id.* "Today only about half of the 7,000 drug treatment programs nationwide provide female patients with child and obstetric care." Catherine Saalfeld, et al. eds., *Intravenous Drug Use, Women and HIV*, in *ACTIVISM*, *supra* note 9, at 125. Fewer than six drug treatment programs in the United States exist specifically for pregnant drug users and are essentially the only programs that will accept pregnant substance users at all.

98. Logli, *supra* note 53, at 563. The author advocates a multidisciplinary approach to governmental intervention, which endorses the view that the need is to protect children from substance abuse but in addition, to establish the necessary treatment programs to reach women, especially those who are pregnant and addicted. In many states, if treatment programs are full, a woman can be sent to a correctional facility even though she has committed no crime. See Robert Batey, *Prosecution of the Pregnant Addict: Does the Cruel and Unusual Punishment Clause Apply?*, 27 CRIM. L. BULL. 99 (1991)

As more courts begin to follow the recent Florida and Connecticut state Supreme Court decisions,<sup>99</sup> prosecutors and the public may soon realize that incarceration of a pregnant woman who is an IV drug user [and perhaps HIV positive] poses an even greater threat of harm to herself and the fetus.<sup>100</sup> Perhaps then, more prosecutors will recognize that women who chose to bear children actually *share* the government's objective of promoting healthy babies.<sup>101</sup> (emphasis added). And as one author noted, "[r]ather than depriving women of the right to make these judgments or punishing women after the fact for making 'wrong choices', [governmental] . . . policies [should] seek to expand women's choices by, for example, improving access to prenatal care, food, shelter, and treatment for drug and alcohol dependency."<sup>102</sup> It is too soon to speculate as to whether there will be a nationwide trend to move away from prosecuting addicted pregnant women.<sup>103</sup>

#### B. WOMEN OF CHILDBEARING AGE AND PREGNANT WOMEN WITH HIV: THE NEXT TARGET

The continued awareness of the effect that maternal substance abuse has on a developing fetus, nevertheless, predominates. And, it is this awareness that allows for the so-called ex-

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(noting that involuntary commitment for pregnant women who refuse drug abuse treatment services raises troublesome issues on both due process and equal protection grounds).

99. Whether the courts will adopt and/or follow the reasoning of those cases, particularly the strict statutory construction analysis, is unknown at this time. The law in this area is in a constant state of flux and it is too soon to tell what impact, if any, these cases will have in other jurisdictions with different statutes and their application to pregnant women, both in substance abuse cases and AIDS related cases.

100. This "policy [of incarcerating these women] appears even more ridiculous in view of data demonstrating that the health status of incarcerated pregnant women is so poor that both the mother and the fetus are likely to suffer as a result of such confinement." Helene M. Cole M.D., *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2666-67 (1990). The author notes that pregnant women in jail are routinely subject to conditions that are hazardous to fetal health, such as overcrowding, 24-hour lock up with no access to exercise or fresh air, exposure to tuberculosis, measles, and hepatitis, and a generally filthy and unsanitary environment.

101. Logli, *supra* note 53, at 565-66.

102. Johnsen, *supra* note 54, at 571.

103. One can only hope that more health officials, and those in the criminal justice system, including judges and prosecutors, as well as state legislatures will move away from punitive measures and focus more attention and effort on rehabilitative long-term care for women substance abusers and obstetric care for the women themselves and their babies.

tension of fetal rights and the continued criminalization of women's behavior.<sup>104</sup> Unfortunately, the fear of more, "innocent" sick babies continues, and as the HIV virus reaches epidemic proportions for women in this country, the criminalization of women's behavior for possible fetal exposure of the HIV virus is no surprise.<sup>105</sup>

While current prosecutions of women passing drug-related symptoms to their children continue, pregnant women with HIV disease are the next target.<sup>106</sup> "A popular method of coping with a problem [including HIV disease] is to make the problem illegal and to punish those whose conduct relates to the problem."<sup>107</sup> Indeed, advocates for increased criminalization of mothers with the HIV disease and of maternal substance abusers have gained increased acceptance for their cause by a continual, almost ex-

104. See generally Barbara Shelly, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?* 92 DICK. L. REV. 691 (1988) [hereinafter Shelly]. In light of the two recent state supreme court decisions, perhaps prosecutorial discretion will take notice and reduce the charges being brought against women. Perhaps instead, prosecutors would focus more attention on the need for better medical care and support services made available rather than the immediate first response of "criminalization" and incarceration.

105. "The tragedy of fetuses being exposed to drugs is compounded by their possible exposure to AIDS." Shelly, *supra* note 104, at 708. In particular, the author notes, "[t]he effect of AIDS on a fetus is even more catastrophic [than drugs] as the infection moves more rapidly to the end-stage than in adults." *Id.* at 709.

106. See generally Gostin, *supra* note 34, for an analysis which looks at drug dependence and HIV as America's two most pressing epidemics, interconnected by a cycle of poverty, physical dependence, and a culture of sharing needles and syringes.

107. See Scott Isaacman, *Are We Outlawing Motherhood for HIV-Infected Women?*, 22 LOY. U. CHI. L.J. 479 (1991) [hereinafter Isaacman]. For a general overview of the use of criminal statutes currently being used to prosecute people with the HIV disease, see generally Marvin E. Schechter, *AIDS: How the Disease is Being Criminalized*, 3 CRIM. JUST. 6 (1988) [hereinafter Schechter]. In addition to specific AIDS-related statutes, such as mandatory disclosure of HIV status, traditional criminal laws such as murder, manslaughter, attempted murder and manslaughter, reckless endangerment, and assault are being used to prosecute people with HIV.

The author notes that "[i]n 1987 alone, twenty-nine bills containing criminal sanctions specifically dealing with AIDS were introduced in state legislatures." *Id.* at 7. In addition, the author recognizes that these criminal statutes ostensibly are aimed at AIDS deterrence and punishment:

With the advent of Acquired Immune Deficiency Syndrome (AIDS), twentieth century society initially responded with a universal call for mass education as the major tool for prevention and containment. In addition, however, criminal laws are being developed and used to address AIDS-specific conduct with speed that is truly remarkable. AIDS, the disease, is fast becoming AIDS, the crime.

*Id.* at 6-7.

clusive, focus on suffering babies, to the exclusion of the health and safety concerns of the mother herself.<sup>108</sup>

Quite like the cases in which mothers are charged with offenses for transferring drugs to their children in utero,<sup>109</sup> state legislatures are now authorizing bills that would criminalize certain practices during pregnancy related to the transmission of the HIV virus.<sup>110</sup> In some states, pregnant women and women of childbearing age are already involuntarily screened for HIV;<sup>111</sup> in Rhode Island neonatal HIV-testing is mandatory.<sup>112</sup> In Illinois, an HIV-exposure statute makes childbearing a felony<sup>113</sup> for

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108. See generally FALUDI, *supra* note 21; Johnsen, *supra* note 54.

109. Criminal prosecutions of pregnant drug users is "a dangerous step down the path of relegating pregnant women to the role of vessels for the developing fetus." Susan Price-Livingston, of Gould, Livingston, Adler & Pulda, in Hartford, Connecticut, Amicus Brief, on behalf of four women's groups for *In re Valerie D.*, 223 Conn. 492 (1992), in CONN. LAW TRIB., Sept. 30, 1992, at A1. That slippery slope, leads to cases "in which the state seeks to sanction or restrain a pregnant women who smokes, or drinks, or engages in physical or other activities which the state believes pose a potential — or real — risk to the developing fetus." *Id.* As this article posits, this slippery slope is upon us and has lead to cases criminalizing actions of HIV-infected pregnant women.

110. See Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM. J. PUB. HEALTH 483 (1990). See generally Molly McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277 (1988). In addition, general 'criminalizing' of AIDS is primarily statutory in nature. See generally Schechter, *supra* note 107. According to another author: "It was estimated that 25 of some 500 AIDS related bills introduced in state legislatures proposed criminal sanctions for conscious transmission of the disease." Thomas Fitting, *Criminal Liability for Transmission of AIDS: Some Evidentiary Problems*, 10 CRIM. JUST. J. 69, 95 (1987) [hereinafter Fitting] (discussing the recent charges that have appeared in criminal cases involving AIDS transmission and the many evidentiary issues that arise in attempting to prove criminal liability for the transmission of AIDS virus). The author cites *People v. Smith*, No M006863-5 (Fresno, Cal. 1987) where, after health officials had alerted the Fresno police that a known prostitute had AIDS, the accused and her pimp were arrested in the act of soliciting a male customer. Both were charged with prostitution and wilful exposure to a communicable disease. *Id.* at 72 n.16. And in New York, "a prosecutor has filed charges that would seek to establish the rule that teeth and saliva of an AIDS carrier can qualify as a lethal instrument based on medical reports suggesting that the AIDS virus is present in saliva." *Id.* at 72 nn.20-21.

111. Howard Minkoff et al., *Routinely Offered Prenatal HIV Testing*, 319 NEW ENG. J. MED. 1018 (1988). Nearly all states now test newborns for HIV, without parental consent and without statutory authorization. See James M. Smith, *AIDS Symposium: Legal Issues Confronting Families Affected by HIV*, 24 J. MARSHALL L. REV. 543 (1991).

112. R.I. GEN. LAWS § 23-6 HIV-1 (1989) (informed consent not required if person tested is under one year of age).

113. Section 12-16.2 of the Illinois Criminal Code outlaws the knowing exposure of another person to the HIV virus and potentially applies to mother-infant transmission. See Isaacman, *supra* note 99, at 485-86. The author focuses on the potential application of the statute to pregnant women, and why the statute would be declared unconstitu-

HIV-infected women. At least four other states have criminalized the knowing exposure of another to the HIV disease.<sup>114</sup>

The Illinois statute is particularly troubling as HIV transmission is not an element of the criminal offense.<sup>115</sup> "An HIV-positive woman commits a felony by becoming pregnant and carrying her pregnancy to term *regardless* of whether she infects her infant."<sup>116</sup> (emphasis added). Thus, the only way a pregnant, HIV-infected woman can avoid violating the law is by terminating her pregnancy.<sup>117</sup> Oklahoma's criminal transmission statute is the most broadly worded of the statutes.<sup>118</sup> If an HIV-positive woman engages in "any activity" that actually infects her child with HIV, the mother becomes a criminal.<sup>119</sup> Knowledge of HIV infection, and intent to transmit it, do not appear to be prerequisites to commission of the crime, if actual viral transmission to another person occurs.<sup>120</sup> In Arkansas, "a person commits the offense of exposing another to HIV if that person knows he or she has tested positive for HIV and exposes another person to such viral infection through perinatal [to fetuses in utero] transfer of blood."<sup>121</sup> The statute does not explain or limit the scope of the phrase "perinatal transfer of blood."<sup>122</sup> "The blood flowing from

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tional if challenged by a pregnant women with HIV for violation of both "liberty" and "fundamental rights." He notes three ways the statute could be used to criminalize childbearing by HIV-infected women: (1) the actual language of the statute, which broadly construed could include "exposure" which occurs during the course of pregnancy; (2) generally, childbearing women are easy targets because they are usually already in the hospital, where they can be tested without their knowledge and consent; and (3) the application of the law merely "disenfranchises the disadvantaged members of society," those women most affected by AIDS already. *Id.* at 480-82.

114. See ARK. STAT. ANN. § 5-14-123 (Supp. 1989); IDAHO CODE § 39-608 (Supp. 1990) IND. CODE ANN. § 35-42-1-7 (Burns 1989) OKLA. STAT. ANN. tit. 21, § 1192.1 (West Supp. 1990); cf. 42 U.S.C.A. § 300ff-47 (West Supp. 1990) (conditioning federal grants for treatment of AIDS on existence of state criminal HIV- transmission statute).

115. ILL. REV. STAT. ch. 38 para. 12-16.2(c)(1989). "Instead of creating a criminal offense for person-to-person HIV *transmission*, [the] legislators created a criminal offense for person-to-person *exposure*." [emphasis added]. Isaacman, *supra* note 107, at 486.

116. Isaacman, *supra* note 107, at 487.

117. *Id.* at 491.

118. OKLA. STAT. ANN., § 1192.1(a)(988) (1990) provides in relevant part: "It shall be unlawful for any person to engage in any activity with the intent to infect or cause to be infected any other person with the human immunodeficiency virus."

119. Closen, *supra* note 19, at 77.

120. *Id.*

121. ARK. STAT. ANN., § 5-14-123 (1989).

122. *Id.*

an HIV-infected mother to her baby through the umbilical cord would make the HIV mother a felon upon birth of the child."<sup>123</sup> The stated goal of such laws and testing programs is to treat HIV-infected children.<sup>124</sup> Yet, "[t]his demonstrates a disregard for the woman's well-being, as well as being scientifically incorrect, since the HIV status of a newborn cannot be determined by early testing."<sup>125</sup> The Illinois statute had no input from health care professionals.<sup>126</sup>

"[T]hese laws encourage HIV-infected mothers to abort their babies to avoid committing crimes."<sup>127</sup> In the end, these laws not only fail to promote family health, but raise the question of whether these states "really intend to outlaw motherhood"<sup>128</sup> through HIV-transmission laws. Similar to the drug-related "delivery" statutes enacted to control the drug epidemic, enacting HIV-specific criminal transmission statutes merely "transfers a portion of the responsibility in the battle against HIV disease to the State's Attorney's office and diverts attention from the . . . Department of Health's failure to combat the disease."<sup>129</sup>

Arguments to challenge these HIV-transmission statutes include vagueness and overbreadth doctrines, and asserting violations of privacy, equal protection, and due process rights.<sup>130</sup> In

123. Closen, *supra* note 19, at 77.

124. *Id.*

125. *Id.* "Although virtually all children born to HIV-positive mothers receive their mother's antibodies and will test positive, not all are actually infected with the virus. An infected child may retain the mother antibodies for fifteen to eighteen months, but will eventually test negative." Risa Denenberg, *Pregnant Women and HIV*, in *ACTIVISM*, *supra* note 9, at 159.

126. Isaacman, *supra* note 107, at 485-6 & n.43. "Instead of a pro-active partnership in effective and efficient lawmaking, what exists is a sophisticated bureaucratic array of reactive responses to the very independent actions of representatives." *Id.*

127. Closen, *supra* note 19, at 77, who notes the medical evidence consistently shows that there is only a twenty to sixty percent chance that an HIV-infected pregnant woman will pass the virus to her newborn child. While abortion is 100 percent certain to terminate a pregnancy, about forty percent to eighty percent of children born to HIV-infected mothers would become uninfected and survive. *Id.*

128. *Id.*

129. Isaacman, *supra* note 107, at 490 & n.93. Moreover, as with prosecutorial discretion in drug-related offenses for pregnant women, the State's Attorney may exercise discretion by not charging some prostitutes who are seropositive with a violation of the statute, despite the possible adverse health effects of such a decision. *Id.* at 479.

130. A complete discussion of these constitutional challenges is beyond the scope of this article, but see Isaacman, *supra* note 107, at 487-93, who focuses on the due process

addition to these constitutional challenges, courts' application of a strict statutory interpretation, as was done in the recent decisions in Florida and Connecticut,<sup>131</sup> reveals that these statutes that criminalize HIV transmission in utero as yet will not withstand a legal challenge. Under closer examination, these HIV transmission laws, like the drug-related statutes and the continued prosecution of drug-addicted pregnant women, seem more motivated by politics rather than health concerns.<sup>132</sup> For as one author noted: "Linking a disease with traditionally unpopular groups and activities has resulted in an inappropriate focus upon criminal sanctions as a mechanism for addressing the current crisis."<sup>133</sup>

### III. REPRODUCTIVE RIGHTS ISSUES AFFECTING PREGNANT WOMEN WITH HIV

#### A. HIV AND THE PUBLICIZATION OF PREGNANCY

One author writes that society's new interest in fetal rights, and in particular the new "privileged status of the fetus" is really just a disguised "assault"<sup>134</sup> on women as mothers who are increasingly perceived as a major threat to unborn babies. She observed:

The focus on maternal behavior allows the government to appear to be concerned about babies without having to spend any money, change any priorities or challenge the status quo. As with crime, as with poverty, what is really a complicated, multifaceted problem is construed as a matter of freely chosen individual behavior. We [believe we] have crime because we have lots of bad people, poverty because we have lots of lazy

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issues, namely the deprivation of childbearing as a fundamental right and liberty interest.

131. See *supra* notes 73-85 and accompanying text.

132. Isaacman, *supra* note 107, at 490. "The approach of criminalizing transmission is based on spurious premise and specious reasoning." *Id.* at 493. Indeed, the author notes even if women were aware of the law, there is no research to indicate that criminalizing HIV transmission will influence sexual conduct or childbearing decisions and historically, such punitive laws aimed at influencing sexual conduct have been ineffectual: "For centuries, laws forbade consensual sexual activity between adults outside the sanctity of marriage. Nevertheless, society remains far from chaste." *Id.* at 494.

133. Schechter, *supra* note 107, at 7.

134. See generally Pollitt, *supra* note 57.



people, . . . and tiny, sickly, impaired babies because we have lots of women who just don't give a damn.<sup>135</sup>

Negative stereotypes persist towards HIV-positive women who choose to bear children despite their HIV status.<sup>136</sup> These stereotypes stem, in part, from the continued social contempt for people with HIV disease,<sup>137</sup> and in part, from the increasingly popular view of women as reproductive vessels,<sup>138</sup> "as vectors of disease to so-called 'innocent' others."<sup>139</sup> Once a woman

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135. *Id.* at 410-411.

136. The stigma of AIDS is a painful reality. For the mother, it often means rejection by friends, mate, or family. If she has an HIV-positive child, it can mean being treated as if she is solely responsible for her child's illness (as if men did not play a role in HIV transmission).

Judith Walker, *Mothers and Children*, in *ACTIVISM*, *supra* note 9, at 171.

137. In *Benjamin R. v. Orkin Exterminating Co.*, 390 S.E.2d 814 (W.VA 1990), the court held that a person who tests positive for HIV has a "handicap" within the meaning of the West Virginia Human Rights Act, for purposes of establishing a claim of employment discrimination. The court noted:

[I]t is difficult adequately to distill from the dry, clinical literature the degree of [physical] suffering that symptomatic AIDS patients endure . . . . [W]hat is most to the point of this case, [is that] the emotional pain is equally intense. In some cases the patients are disowned by their families at a time when they need them the most. They lose their jobs along with their insurance and are left destitute, helpless in the face of the stigma of the disease and treated everywhere as lepers.

*Id.* at 826. The stigma of AIDS stems primarily from the initial discrimination against gay men, including homophobia, and a general lack of understanding, panic, and misinformation which has surrounded public education and the media around the AIDS epidemic. See generally SHILTS, *supra* note 25; AIDS: CASES AND MATERIALS, *supra* note 7; *The AIDS Hysteria*, NEWSWEEK, May 30, 1983, at 42; AIDS: *Public Enemy No. 1*, NEWSWEEK, June 6, 1983 at 95; AIDS: *The Saliva Scare*, NEWSWEEK, October 22, 1984, at 103; *The AIDS Epidemic*, Cong. Rec., pp. E66-E68 (daily ed. Jan. 7, 1987) (statement of Congressmen William Dannemeyer); Gruson, *Fear Spawns Ethics Debate As Some Doctors Withhold Care*, N.Y. TIMES, July 11, 1987, at A1; Monmaney, et al., *Preying on AIDS Patients*, NEWSWEEK, June 1, 1987, at 52-53. Over the years, many have argued, "were AIDS a disease initially believed to strike white, heterosexual, upper-class men, funding for research and treatment would have been plentiful." *ACTIVISM*, *supra* note 9, at 205.

138. Zarembka, *supra* note 9, at 526; see generally RICH, *supra* note 1.

139. Zarembka, *supra* note 9, at 524.

[W]hat lies at the heart of the medical neglect of HIV positive women is the view that they are vectors of disease to so-called 'innocent' others. When infants born with HIV antibodies are called 'the innocent victims', the clear implication is that their mothers are in some way guilty or deserving of their infection.

*Id.* at 523-24.

becomes pregnant, her life, her lifestyle and her medical options become subject to public control and scrutiny. One author has called this the "publicization" of pregnancy.<sup>140</sup> From this perspective, a woman's womb is like "quasi-public territory,"<sup>141</sup> and a woman's right to bodily integrity and autonomy receives minimal respect.<sup>142</sup>

This "publicization" of pregnancy has also resulted in an undermining of a woman's right to privacy established under *Roe v. Wade*.<sup>143</sup> Moreover, identifying itself as "the defender of

140. *Id.* at 526. "This publicization of pregnancy has . . . resulted in a growing body of 'fetal rights' jurisprudence in which pregnant women have been compelled to undergo particular therapies or medical procedures for the benefit of the fetus, but to the detriment of the mother." *Id.* See generally Janet Gallagher, *Prenatal Invasions and Intervention: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987).

141. *Id.* "The 'publicization' of pregnancy was endorsed by the Supreme Court in *Webster v. Reproductive Health Services*, where the plurality of the Supreme Court found that a state can lawfully proclaim that life begins at conception, and then legislate in such a way that elevates the state's interest in "potential human life" over the pregnant woman's interest in bodily integrity, privacy, and reproductive decision making." *Id.* See also Neff, *supra* note 61, at 327.

142. See Rosa H. Kim, *Reconciling Fetal/Maternal Conflicts*, 27 IDAHO L. REV. 223 (1991) [hereinafter Kim].

143. *Roe v. Wade*, 410 U.S. 113 (1973); Kim, *supra* note 142, at 128; see also *Casey v. Planned Parenthood of S.E. PA*, 112 S. Ct 2791, 2806 (1992) where Justice O'Connor, writing for the majority, provided a comprehensive constitutional analysis of a woman's interest in terminating her pregnancy, and the state's interest in potential life:

[T]hough the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist. . . . Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.

*Id.* In rejecting the *Roe* trimester framework, the court, instead, employed an undue burden test, recognizing the states "profound interest in potential life:"

To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis . . . . An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability . . . . To promote the State's interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed. Measures designed to advance this interest should not be invalidated if

fetal rights, the state reveals its latent suspicion that a pregnant woman is untrustworthy, irresponsible, and an adversary to her fetus."<sup>144</sup>

Nevertheless, "[t]he growing jurisprudence of 'fetal rights' and the push to compel HIV-positive women to abort,"<sup>145</sup> one author noted, "are really two sides of the same issue, for they both derive from an increasingly popular desire to substitute the reproductive judgment of others for that of pregnant poor women."<sup>146</sup> Moreover, "[t]he government, through the exercise of its health and safety power, has an interest in stopping the spread of AIDS and HIV infection without regard to the mode of transmission."<sup>147</sup> However, because HIV can be transmitted by women in utero, certain governmental policies are being developed to reduce this mode of transmission.<sup>148</sup> Unfortunately, as one author cautioned, these "[p]olicies [aimed at fertile women with AIDS or HIV infection] to screen for and counsel

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their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

*Id.* at 2821. The significance of this new law, how the courts will apply this new "undue burden" test, and the extent to which a state may enact regulations to promote its interest in the potentiality of human life, is yet to be established.

144. Neff, *supra* note 141, at 330. See generally Anita L. Allen, *Legal Issues In Nonvoluntary Prenatal HIV Screening*, in *NEXT GENERATION*, *supra* note 10, at 166. The author specifically addresses how the early reports of the AIDS epidemic and HIV infection on pregnant women and infants immediately spawned proposals for prenatal testing, and that these prenatal AIDS testing policies "will become yet another battleground for the fetal personhood debate." *Id.* at 170; compare with, Nancy Hutton & Lawrence S. Wilson, *Maternal and Newborn HIV Screening: Implications for Children and Families*, in *NEXT GENERATION* *supra* note 10, at 105, who argue that HIV screening of pregnant women and newborns, if universally offered and voluntary, is necessary because it facilitates early diagnosis and early aggressive intervention by identifying at-risk infants in need of careful monitoring.

145. Closen, *supra* note 19, at 78.

146. Zarembka, *supra* note 9, at 526-27; see generally H. Amaro, *Women's Reproductive Rights in the Age of AIDS, New Threats to Informed Choice*, 97th Annual Convention of the American Psychiatric Association, New Orleans, La. (1989) for a thorough discussion of the connection between HIV and reproductive rights.

147. Banks, *supra* note 11, at 354.

148. *Id.*

These [governmental] policies advocate routine HIV screening to identify and counsel HIV-infected pregnant women and women of childbearing age. Given the current state of obstetric technology, there are only two possible outcomes to prevent perinatal transmission of HIV: abortion for pregnant women and sterilization for all infected fertile women.

*Id.*

pregnant women and women of childbearing age about HIV infection present enormous possibilities for abuse through involuntary testing and directive counseling to abort or to be sterilized."<sup>149</sup>

## B. ABORTION AND STERILIZATION: A LAST RESORT?

Two of the primary reproductive rights issues for HIV-positive women is support for their right to have children if they so desire and support for women who choose not to continue their pregnancies. HIV-positive women are confronted with a variety of conflicting measures aimed at reproductive control; for example, they are counseled to abort pregnancies they may want to complete, yet denied abortions by fearful practitioners.<sup>150</sup>

The current emphasis on testing<sup>151</sup> women for HIV early in pregnancy is geared more toward preventing the birth of a potentially HIV-infected baby than on providing the woman with better health care.<sup>152</sup> And, in the interests of saving the children and preventing future cases of children with HIV disease, some state legislatures, through the exercise of their health and safety power, have implemented special policies allegedly to reduce the transmission from mother to child.<sup>153</sup> Some of the policies in-

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149. *Id.* at 351; see Anita L. Allen, *Legal Issues in Nonvoluntary Prenatal HIV Screening*, in *NEXT GENERATION*, *supra* note 10, at 166 (discussing the legal issues raised by nonvoluntary testing or screening of pregnant women for evidence of the HIV infection).

150. *Reproductive Rights and AIDS: The Connections*, in *ACTIVISM* (Marion Banzhaf, et al.) *supra* note 9, at 206.

151. See *Warrants for Screening Programs: Public Health, Legal and Ethical Frameworks*, in *NEXT GENERATION* (Ruth R. Fadin et al.) *supra* note 10, at 3, for a background on the legal, ethical, and public health issues concerning the various types of screening and testing programs for HIV infection; and Banks, *supra* note 11, at 355-61, for a general discussion on HIV testing and screening methodologies.

152. See generally Zarembka, *supra* note 9; compare Anita L. Allen, *Legal Issues in Nonvoluntary Prenatal HIV Screening*, in *NEXT GENERATION*, *supra* note 10, at 166. The author provides a comprehensive analysis on the legal issues raised by nonvoluntary testing or screening of pregnant women for evidence of the HIV disease.

Nonvoluntary AIDS testing options range from the very coercive (e.g., governmentally mandated testing of all pregnant women and testing mandated as a condition for receiving prenatal care) to mildly coercive (e.g., routine AIDS testing of blood obtained for other pregnancy-related purposes without advance patient notification or informed consent).

*Id.*

153. See generally Katherine L. Acuff, *Prenatal and Newborn Screening: State*

clude routine HIV screening and counseling of HIV-infected pregnant women and women of childbearing age.<sup>154</sup> Other policies, based on the recognition of the importance of early diagnosis, promote HIV screening of newborns.<sup>155</sup> Public health officials in New York, for example, are anonymously testing all newborns for HIV antibodies.<sup>156</sup> The state's justification for testing is to prevent future cases of HIV in children. While this is an important goal, often lost in the testing scheme is the fact that testing newborns tells us far more about the HIV status of the mothers than it does about the present health status of the children.<sup>157</sup> Finally, as one author noted: "Screening programs authorized by the government by no means exhaust the number or kinds of screening tests currently performed on pregnant women and newborns."<sup>158</sup> Many screening tests are performed routinely by obstetricians and pediatricians without benefit of legislation

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*Legislative Approaches and Current Practice Standards*, in NEXT GENERATION, *supra* note 10, at 121, for a full discussion of the current state statutes, regulations, and informal policies of prenatal and newborn screening for HIV screening throughout the United States. See also Nancy E. Kass, *Reproductive Decision Making in the Context of HIV: The Case for Nondirective Counseling*, in NEXT GENERATION, *supra* note 10, at 308, who considers the purposes of counseling, different models of interacting with women of reproductive age. The author also provides recommendations for actual counseling sessions for HIV infected women considering pregnancy and counseling of women who are HIV positive and pregnant. *Id.* at 321-323. For the pregnant woman who is HIV-positive, the author suggests:

[T]he information provided should emphasize perinatal transmission rates, current knowledge about the likely scenarios for an infected baby, and her own prognosis and options for treatment . . . . [T]here should be a discussion of who will care for her baby if and when she becomes sick and what having a baby means to her.

*Id.* at 323.

154. Center for Disease Control (CDC), *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 MORBIDITY AND MORTALITY WKLY REP. 509, 512 (1987).

155. Nancy Hutton & Lawrence S. Wissow, *Maternal and Newborn HIV Screening: Implications for Children and Families*, in NEXT GENERATION, *supra* note 10, at 116.

156. *HIV Seroprevalence in Newborns in New York State*, 261 JAMA 1745 (Lloyd F. Novick, et al.) (1989).

157. Closen, *supra* note 19. The antibody testing of newborns detects the mother's HIV antibody status, not the infants. *Id.*; see also Isaacman, *supra* note 107. Research indicates that the risk of an HIV-positive women's having an HIV-infected baby is only about twenty to fifty percent. Moreover, while roughly one third of the babies born to HIV positive women will be infected with the virus, all of them will be born with HIV antibodies. Yet when they develop their own anti-bodies, they may turn out to be HIV negative; this is known as a false positive. *Id.*

158. Katherine L. Acuff, *Prenatal and Newborn Screening*, in NEXT GENERATION, *supra* note 10, at 128.

or public health regulation.<sup>159</sup> Consequently, although the HIV-antibody test only shows her status, many of these medical practices include directed counseling suggesting abortion.<sup>160</sup>

“Not only has neo-natal HIV antibody testing failed to result in adequate medical care for mothers with HIV, but HIV antibody testing has had significant negative consequences for women.”<sup>161</sup> Moreover, poor women and women of color often have limited access to health care, and may consent to terminate their pregnancy fearing loss of medical treatment if they do not comply.<sup>162</sup> In some instances, women purposefully avoid prenatal care altogether for fear of the response of health care provid-

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159. *Id.*

160. “Many women who test positive during their first trimester of pregnancy are met with coercive counseling to abort.” Zarembka, *supra* note 9, at 524. Two health care facilities in Rhode Island, for example, have adopted this as an official policy when treating HIV positive women. See Maynard & Indacochea, *HIV Infection in Pregnant Women in Rhode Island, 1985-1988*, 320 NEW ENG. J. MED. 1626 (1989). According to one doctor: “Pregnant women, if infected . . . should consider terminating their pregnancies. Otherwise more and more children will be born with AIDS, further squeezing urban hospitals and frustrating pediatricians who can offer little hope for a long or pain free life.” *MD's Urge More Testing for AIDS. Suggest Screening Pregnant Women*, MIAMI HERALD, Feb. 27, 1988, at 1A; compare, Patricia A. King, *Legal Issues in Voluntary Prenatal HIV Screening*, in NEXT GENERATION, *supra* note 10, at 201, for an interesting discussion of both the doctors' perspective with regard to potential liability for failure to inform patients about their reproductive risks in carrying a pregnancy to term, balanced with the need to counsel women about the life-threatening nature of their illness, where “the incentives for abortion will be high.” *Id.* at 213.

161. Zarembka, *supra* note 9, at 524. See generally NEXT GENERATION, *supra* note 10 for a comprehensive analysis of the impact of HIV screening and testing on pregnant women and newborns; compare Nancy Hutton & Lawrence S. Wissow, *Maternal and Newborn HIV Screening: Implications for Children and Families*, in NEXT GENERATION *supra* note 10, at 105, who advocate for increased prenatal and neonatal screening:

Early diagnosis of HIV infection permits more prompt and focused management of the immunodeficient child . . . and thus holds the promise of both extending and improving the child's quality of life. HIV screening of pregnant women or newborns facilitates early diagnosis and early, aggressive intervention by identifying at-risk infants in need of careful monitoring. As a result, such screening clearly benefits the subset of newborns who have HIV infection, especially if it can prevent catastrophic illness from PCP in the first months of life. For these infants, the medical benefits of early diagnosis outweigh the social risks of being identified as HIV infected.

*Id.* at 116.

162. One commentator notes that women, regardless of color or education level, are less likely than men to question doctor's orders. Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low Income Women*, 11 WOMEN'S RTS. L. REP. 15, 26 (1989).

ers,<sup>163</sup> fear of accusations of child abuse and drug addiction,<sup>164</sup> and lectures about how they are incompetent to raise children.<sup>165</sup> Some laws realistically contribute to these fears.<sup>166</sup> A related disincentive to seeking health care also derives from a fear of criminal prosecution.<sup>167</sup>

If an HIV-positive woman gets pregnant and does not want to continue the pregnancy, she may experience discrimination by the health clinicians themselves,<sup>168</sup> if she has access to health care at all. A survey of New York City abortion clinics revealed that sixty-four percent denied HIV-positive women an appointment for an abortion.<sup>169</sup> One author noted that in addition to the general barriers to treatment facing pregnant women drug addicts,<sup>170</sup> women who are HIV positive face resistance from practitioners who avoid treating HIV positive patients.<sup>171</sup> Even

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163. Nonconsensual AIDS testing can only further such perceptions. Anita L. Allen, *Legal Issues in Nonvoluntary Prenatal HIV Screening*, in *NEXT GENERATION*, *supra* note 10, at 173. See generally Nancy Hutton & Lawrence S. Wissow, *Maternal and Newborn HIV Screening: Implications for Children and Families*, in *NEXT GENERATION*, *supra* note 10, at 105.

164. See Oberman, *supra* note 52, at 519-25, for a complete discussion on child abuse and neglect reporting laws and their impact on pregnant users of controlled substances.

165. This sentiment arises from the nonspecific fear and mistrust of the system. See ACLU, *REPORT OF THE AMERICAN CIVIL LIBERTIES UNION AIDS PROJECT* (1990).

166. See, e.g., ILL. REV. STAT. ch. 37, para. 802-3(b)-(c)(1989) (exposure to HIV/AIDS may be deemed abuse under wording of statute); Isaacman, *supra* note 107, at 482.

167. See *supra* notes 108, 111-114 and accompanying text. In Michigan, a case was recently filed against a woman for delivering cocaine to her baby through the umbilical cord. Once the doctor learned her of cocaine use, she who was ordered tested by her doctor. The hospital kept the baby for observation, tested the baby, and then notified the Department of Social Services (DSS) of the positive result. Both the doctor's decision to test and the hospital's decision to report were optional. However, once DSS received the report, it was obligated to notify the local prosecutor. On the basis of the baby's test results, the local county prosecutor charged her with delivering drugs to a minor. Ann Perlman, *Cocaine Babies*, ANN ARBOR NEWS, April 22, 1990, at A7.

168. Banks, *supra* note 11, at 374-76.

169. Address by K. Frank, *HIV-Related Discrimination in Abortion Clinics in New York City*, A Report by the New York City Commission on Human Rights, Abstract, V International Conference on AIDS, Montreal, Canada (June 1989).

170. See Oberman, *supra* note 52, at 517 for an insightful discussion on pregnant drug addicts and the lack of drug abuse treatment programs. Among the several factors for the treatment shortages, the author notes, is the fact that many pregnant addicts are at high risk for contracting HIV. She and her researchers called several treatment centers on behalf of a "hypothetical friend" described as twenty years old, employed part-time, lacking health insurance, eight weeks pregnant and using cocaine on a daily basis. After narrowing their search to seven program centers for treatment of drug addicts, when contacted, all seven programs refused to accept pregnant women. *Id.* at 518.

171. *Id.* at 519.

more threatening, a prominent physician in Puerto Rico has recommended that HIV positive women be sterilized to reduce the number of children with HIV.<sup>172</sup>

Both abortion and sterilization issues involve the right of a woman to control the reproductive aspects of her body and become directly related in the context of HIV prenatal screening.<sup>173</sup> In many instances, the only reason for the HIV prenatal screening is to identify pregnant infected women and to counsel them to abort or submit to medical treatment, specifically sterilization. This policy effectively denies HIV-infected pregnant women bodily autonomy over the choice of continuing their pregnancy or aborting the fetus. "A government policy which advocates sterilization through directive counseling of fertile HIV-infected women or abortion for pregnant women infected with HIV is precisely the kind of interference with private decision making that *Skinner* and *Roe* attempt to prevent."<sup>174</sup> If directive counseling is permitted for pregnant women with HIV, then the door is left open for other governmental restriction on women's reproductive rights, arguably in the name of maternal or fetal health.<sup>175</sup> "Given the racial composition of the women currently thought to be at risk,"<sup>176</sup> one author aptly recognized, "HIV screening and counseling proposals designed to somehow prevent perinatal transmission have genocidal overtones."<sup>177</sup>

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172. Address by C. Zorrilla, Associate Professor, School of Medicine, University of Puerto Rico, *AIDS in Puerto Rico and Among the Puerto Rican Population on the Mainland*, International AIDS Conference, Washington, D.C. (1989).

173. In *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), the Supreme Court recognized that the right to procreate is fundamental and that efforts by the government to sterilize individuals will be strictly scrutinized. Two later decisions, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), recognized the right of an individual to decide whether to bear a child. Subsequently in *Roe v. Wade*, 410 U.S. 113 (1973), the Court extended this fundamental right to include the right of a woman to choose an abortion. At issue in the context of HIV prenatal screening is whether such a program is the appropriate means to accomplish this compelling state interest of spreading the mildly contagious, yet often fatal disease, HIV, especially when the possible target of infection is a newborn child.

174. Banks, *supra* note 11, at 379.

175. Janet Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 48 n.203 (1987); see also Banks, *supra* note 11, at 379 n.149.

176. See *supra* notes 28-30 and accompanying text.

177. Banks, *supra* note 11, at 354.



## CONCLUSION

Women are increasingly becoming the fastest growing population among the general population to be hit by the AIDS epidemic.<sup>178</sup> The Center for Disease Control (CDC) and the World Health Organization reported that HIV was the fifth leading cause of death in the United States for women of childbearing age in 1991, affecting more than 15,000 women.<sup>179</sup> HIV-infected women who exercise their right to conceive and bear children must be supported. For this right to choose to have any meaning, HIV-infected women must have access to appropriate health care.<sup>180</sup> Women who choose not to continue their pregnancies must also be supported.<sup>181</sup> Because the fundamental right to an abortion does not have to be paid for by the government,<sup>182</sup> poor

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178. Dazon Dixon, *Facing Reality: AIDS Education and Women of Color*, in *ACTIVISM*, *supra* note 9, at 227-29. In her provocative article on the impact of AIDS on women of color, the author observed:

AIDS is forcing us all to reexamine our sexual and general health priorities. It has opened a gigantic Pandora's box of the social ills and oppression that women of color are surviving. Now we are seeing the Western-white-male-dominated culture behave in its true form. In the name of investment and profit, poor health care planning, and lack of interest in the affected lives, they are watching people die.

*Id.* at 228-29.

179. CENTER FOR DISEASE CONTROL (CDC), *HIV/AIDS Surveillance Report*, October 1992.

180. Banks, *supra* note 11. "To do otherwise not only makes the principles of *Skinner* and *Roe* meaningless for infected women, but calls into question the rationale for HIV prenatal screening and counseling." *Id.* at 380.

181. See generally Nancy E. Kass, *Reproductive Decision Making in The Context of HIV*, in *NEXT GENERATION*, *supra* note 10, at 308.

HIV disease brings to reproductive decision making a threat to autonomy and privacy, which have emerged as two of our most cherished, albeit tenuous values. It poses a threat by virtue of the fact that when a woman, herself with a fatal illness, becomes pregnant and can transmit a fatal virus to her newborn, the issues that arise are extremely difficult and extremely emotional. Illness, perhaps particularly illness among children, can make interests that conflict with autonomy seem uniquely compelling. Indeed it is only because autonomous reproductive decision making is so crucial for the preservation of respect for a class of human beings that, in the end, it must be given precedence. It is for this reason that nondirective counseling must be advocated when reproductive decisions are being made in the context of HIV.

*Id.* at 324.

182. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

women are often denied access to abortion,<sup>183</sup> and for many the only solution has been sterilization.<sup>184</sup> Federal health policy contributes to the lack of prenatal care as Medicaid and medical insurance for the poor does not cover prenatal care before nineteen weeks of pregnancy, thus leaving poor women of color without the resources to seek early prenatal care if they desire it.<sup>185</sup> Moreover, more than one quarter of "women of reproductive age . . . have no insurance to cover maternity care, and two-thirds of these . . . have no health insurance at all."<sup>186</sup>

Despite these alarming developments, conservative, economic and political ideals continue to promote motherhood as an "experience not to be missed"<sup>187</sup> and as a woman's duty. Motherhood has always been a biological option for women and can be rewarding, but it should not be romanticized.<sup>188</sup> The truth is, for most women, motherhood remains primarily a woman's responsibility, with very few support systems and which alters women's lives dramatically.<sup>189</sup>

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183. As one author noted: "Ironically, federally funded sterilizations remain free on demand. If abortion is not a viable option for poor women, there is little reason for prenatal HIV screening." Banks, *supra* note 11, at 381.

184. By 1977, the passage of the Hyde Amendment in Congress had mandated the withdrawal of federal funding of abortions, causing many state legislatures to follow suit. . . . Since surgical sterilizations, funded by the Department of Health, Education and Welfare [now Health and Human Services], remained free on demand, more and more poor women have been forced to opt for permanent infertility.

ANGELA DAVIS, *WOMEN, RACE AND CLASS* 206 (1981).

185. Powell, *supra* note 55, at 613.

186. Committee to Study Outreach For Prenatal Care, Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* 56 (Sarah B. Brown ed., 1988) at 5.

187. FALUDI, *supra* note 21, *Teen Angels and Unwed Witches: The Backlash on TV*, in *BACKLASH*. Faludi describes the media's onslaught of information aimed at trying to make women feel anxious and guilty for not having children, and instead pursuing careers:

In our personal life, we must observe, we have noted an absolute blossoming of both marriages and of births to many women who seemed, not all that long ago, singlemindedly devoted to the pursuit of personal careers. It's nice to hear again the sound of wedding bells and the gurgles of contented babies in the arms of their mothers.

*Id.* at 107, quoting the *SAN FRANCISCO CHRONICLE*.

188. CHARLOTTE PERKINS GILMAN: *THE MAKING OF A RADICAL FEMINIST 1860-1896* 229-50. (Norma Hill ed., Temple University Press, 1980).

189. In a dissenting opinion, Justice Blackmun responded to the Chief Justice's criticisms of *Roe v. Wade* and commented upon the Justices "stunted conception of liberty" with regard to pregnant women, and the impact that childbirth and motherhood has on

Today, HIV-positive women confront the denial of reproductive control in various ways: they are counseled to abort pregnancies they might want to complete, denied abortions by fearful practitioners should they decide they want to terminate their pregnancies, coerced into sterilization, forced into the criminal justice system and subjected to societal judgments about all their decisions.<sup>190</sup> The current methods to prevent the so-called "tragedy and cost" to HIV-infected children, merely represent a valuing of fetus over women. Testing during pregnancy or immediately after delivery puts a woman at risk of losing certain rights without any promise of treatment or services.<sup>191</sup> "She may fear loss of custody of her children, or feel pressure to abort or accept sterilization."<sup>192</sup> Putting women in

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women's lives:

In the Chief Justice's world, a woman considering whether to terminate a pregnancy is entitled to no more protection than adulterers, murderers, and so-called "sexual deviates". . . . Even more shocking than [his] cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives. The only expression of concern with women's health is purely instrumental . . . only women's psychological health is a concern, and only to the extent that he assumes that every woman who decides to have an abortion does so without serious consideration of the moral implications of their decision . . . In short, . . . [his] view of the state's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal.

Casey v. Planned Parenthood of S.E. PA, 112 S. Ct 2791, 2852 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

190. See generally Banks, *supra* note 11, at 354 & n.12, (arguing poor women and women of color with AIDS have become the next target for passive and aggressive genocidal policies, through mandatory testing, negligent health care, criminal prosecutions, and, in general, societal disdain).

191. See Nancy Hutton & Lawrence S. Wissow, *Maternal and Newborn HIV Screening: Implications for Children and Families*, in NEXT GENERATION, *supra* note 10, at 105. The authors acknowledge the harmful effect for women and families when one's infant is identified as being HIV positive, but conclude that, within a context of and a system of ongoing, high-quality pediatric care, the benefits of HIV screening of pregnant women or newborns outweigh the risks. *Id.* at 105.

192. Risa Denenberg, *Pregnant Women and HIV*, in ACTIVISM *supra* note 9, at 160.

An analogy may be drawn to society's fight against drug abuse. Despite the long history of criminalization of drug use, current harsh laws, and mandatory sentencing, the drug problem persists. In fact, drug abuse is one of the most serious problems confronting our society today. [See National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)]. Treating the problem as a crime rather than an illness makes life more unfortunate for those who already lead difficult lives. Punitive

jail or terminating parental rights fails to address the need for treatment, ignores the health and safety concerns of the mother, and perpetuates the view of women as selfish and uncaring.<sup>193</sup>

There is a compelling need for state, local and federal legislation to recognize the fact that women who bear children share the government's objective of promoting healthy births and that existing obstacles, and not bad intentions impede the attainment of this common goal.<sup>194</sup> Governmental intervention should promote policies which seek to expand women's reproductive choices, rather than depriving women of the right to make choices about their bodies or punishing women after the fact for

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approaches to health issues alienate those suffering from drug addiction, disease, and poverty, and erect barriers to obtaining needed medical services.

Isaacman, *supra* note 107, at 494. The laws requiring health care practitioners to report pregnant women suspected of using drugs are, at best, remotely related to preserving or enhancing fetal health. As one author observed:

The only plausible positive effect of such a law would be to scare women out of using drugs by threatening them with the loss of autonomy and the eventual loss of child custody. Yet those who are the addicts, and whose drug use therefore poses the greatest risk of harm to their fetuses are the least likely to be able to quit in response to the threat.

*Id.* For female IV drug users who are HIV positive, the issue becomes not one of drug treatment and 'quitting,' but of health care which again, becomes somewhat tangential as the focus remains on the fetus, to the exclusion of the health needs of the pregnant woman herself.

193. One way to better meet the needs of pregnant women with HIV disease is to find the common ground between women and AIDS activists, for as one author noted, "reproductive rights and AIDS activism are intimately connected." Marion Banzhaf, et al, *Reproductive Rights and AIDS: The Connections*, in *ACTIVISM*, *supra* note 9, at 200. Both movements are committed to claiming political control over the body, both movements focus on health care and self-empowerment, and both movements address issues at the core of how our society is organized economically and sexually. *Id.* at 200-201. Reproductive rights should include not only the right to have sex without unplanned pregnancy and the right to determine whether and when to have children, but the right and access to quality health services and control over health care decisions. Therefore, women's issues must become part of all AIDS activists' demands which become a part of the larger agenda to fight HIV, particularly where treatment and drugs are concerned. For example, women are hard pressed to find insurance policies to cover abortion, at the same time that people with AIDS find their insurance terminated upon diagnosis. *Id.* See generally Zoe Leonard, *HIV-Antibody Testing and Legal Issues for HIV-Positive People*, in *ACTIVISM*, *supra* note 9, at 65 (proposing that improved data and improved health care services for women will emerge only when women fight for it, and that expanded treatment and support services for IV drug users must become an integral part of the [AIDS activist] movement).

194. See Johnsen, *supra* note 54, at 571; Logli, *supra* note 53, at 559.

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making “wrong” choices.<sup>195</sup> Only then will pregnant women and women of childbearing age not be forgotten or neglected, for as Katha Pollitt poignantly reminds us:

There is still a vague but powerful cultural fear that one of these days, women will just walk out on the whole business of motherhood and the large helpings of humble pie we have, as a society, built into that task. And *then* where will we be?<sup>196</sup>

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195. Johnsen, *supra* note 54.

196. Pollitt, *supra* note 57, at 416.